IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC86417**
	)	
RONALD HAMPTON, Jr.,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
TWENTY-FIRST JUDICIAL CIRCUIT
THE HONORABLE MELVYN W. WIESMAN, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Hampton adopts and incorporates by reference the jurisdictional statement from his opening brief.

STATEMENT OF FACTS

Hampton adopts and incorporates by reference the Statement of Facts from his opening brief.

POINTS RELIED ON

I.

The trial court clearly erred in allowing the State to exercise a peremptory strike against African-American venireperson Sandra Jones after the court had ruled in favor of Hampton's *Batson* challenge to that strike, because this violated Hampton's and Jones' rights to equal protection pursuant to the 14th Amendment to the United States Constitution and Article I, section 2 of the Missouri Constitution, in that the trial court initially denied that strike, finding that there were similarly-situated white jurors that were not stricken, which, in essence, is a finding that the State had racially discriminated against Jones when it exercised a peremptory challenge to remove her; but contrary to the existing case law that the remedy for such a violation is to quash the strike and permit the venireperson to sit on the jury, Jones was not re-seated, rather, the State was allowed to remove a similarly-situated white juror by using an extra strike that resulted from the trial court's ruling that another juror (Dotson) had been racially stricken by the prosecutor; this left Jones off the jury and kept the racial composition of the jury the same, which did not remedy the violation of Hampton's and Jones' equal protection rights.

State v. Hopkins, 140 S.W.3d 143 (Mo. App. E.D. 2004);

State v. Grim, 854 S.W.2d 403 (Mo. banc 1993);

State v. Marlowe, 89 S.W.3d 464 (Mo. banc 2002); and

Batson v. Kentucky, 476 U.S. 79 (1986).

ARGUMENT

I.

The trial court clearly erred in allowing the State to exercise a peremptory strike against African-American venireperson Sandra Jones after the court had ruled in favor of Hampton's *Batson* challenge to that strike, because this violated Hampton's and Jones' rights to equal protection pursuant to the 14th Amendment to the United States Constitution and Article I, section 2 of the Missouri Constitution, in that the trial court initially denied that strike, finding that there were similarly-situated white jurors that were not stricken, which, in essence, is a finding that the State had racially discriminated against Jones when it exercised a peremptory challenge to remove her; but contrary to the existing case law that the remedy for such a violation is to quash the strike and permit the venireperson to sit on the jury, Jones was not re-seated, rather, the State was allowed to remove a similarly-situated white juror by using an extra strike that resulted from the trial court's ruling that another juror (Dotson) had been racially stricken by the prosecutor; this left Jones off the jury and kept the racial composition of the jury the same, which did not remedy the violation of Hampton's and Jones' equal protection rights.

A *Batson*[1] challenge consists of a three-stage process: (1) Opponent alleges that proponent's peremptory strike was discriminatory; (2) Proponent is required to give a race-neutral explanation for the strike; and, (3) Trial court determines whether the opponent of the strike has proven purposeful discrimination. ***State v. Marlowe***, 89 S.W.3d 464, 468-69 (Mo. banc 2002).

In Hampton's opening brief, he argued that he is entitled to a new trial because, after the trial court found that the State had racially discriminated against two venirepersons (Dotson and Jones) when it exercised its peremptory challenges to remove them, the trial court clearly erred when it did not re-seat one of the improperly stricken jurors (Jones). Hampton noted that the trial court's actions were contrary to this Court's prior cases that have held that once a *Batson* violation has been found, the trial court is to "quash the strikes and permit those members of the venire stricken for discriminatory reasons to sit on the jury if they otherwise would." E.g., ***State v. Grim***, 854 S.W.2d 403, 416 (Mo. banc 1993). Yet here, the trial court did not re-seat Jones. The racial discrimination was not rectified because she remained wrongfully excluded from jury service. Jones had a right not to be excluded from jury service for a racially discriminatory reason, ***Powers v. Ohio***, 499 U.S. 400, 409 (1991), and Hampton had a constitutional right to be tried by a jury whose members were selected pursuant to nondiscriminatory criteria, ***Batson***, 476 U.S. at 85-86.

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[1] ***Batson v. Kentucky***, 476 U.S. 79, 86-87 (1986).

Respondent argues that the trail court "never made a final determination that the State had exercised its peremptory strike of Jones in a racially discriminatory manner" (Resp. Br. at 22). Hampton disagrees. A reading of the record shows that the trial court had found that there was purposeful discrimination.

The prosecutor used five of its six peremptory strikes to remove African-American venirepersons (Tr. 222-23). Hampton made a *Batson* challenge to each of those strikes (Tr. 222-23) (Stage 1).

After the prosecutor gave his reason for the strike (Tr. 225-26) (Stage 2), Hampton pointed out that part of the prosecutor's stated reason for the strike was not supported by the record and that a similarly-situated white juror had not been struck (Tr. 226) (Stage 3). The prosecutor made no reply to Hampton's argument (Tr. 226-27).

At this third stage, regarding Jones, the trial court found: "I believe there are similarly situated white *jurors* that were not stricken. The motion to strike will be denied . . . *under Batson*." (Tr. 229) (emphasis added).

Contrary to respondent's assertion, the record shows that the trial court *had* finally concluded that the prosecutor's reason was pretextual. A trial court cannot deny a peremptory strike "under Batson" (Tr. 229) unless the court has determined that there was purposeful discrimination. Here, the trial court denied the State's strike of Jones "under Batson" (Tr. 228-29). The trial court had concluded that the prosecutor's reason was pretextual.

Respondent also argues that once the prosecutor had agreed to use a peremptory strike to remove a similarly-situated veniremember (Sestrich), the trial court concluded that the State's reason was not pretextual (Resp. Br. at 23).

The record does not reflect that the trial court concluded that the State's reason was not pretextual. Certainly the trial court never stated such. If the trial court had concluded that the State's strike was not pretextual, as asserted by respondent, then the State would not have been forced to utilize its additional strike[2] to remove Sestrich. It would have been able to use its newly-gained strike to remove whomever it wanted to. Yet it was forced to use the strike to remove Sestrich. This shows that the court had *not* concluded that the strike was not pretextual.

In Hampton's opening brief, he pointed out that the prosecutor misstated the record, asserting that Jones had indicated that "she didn't care for" being cross-examined as a witness. But when Jones was asked "Were they mean to you?" she replied, "no" (Tr. 177). When Jones was asked "Were they tough on you?" she again replied, "no" (Tr. 177). She said that there was nothing about that experience that would prevent her from being a juror (Tr. 177).

Respondent asserts that "It does not matter whether the (sic) Jones liked or disliked the experience of being cross-examined. What does matter is that she was, in

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[2] The prosecutor was able to have this additional strike because of the first *Batson* violation involving venireperson Dotson (Tr. 227).

fact, cross-examined and that this was a valid race-neutral reason for the State to use a perremptory strike to remove her" (Resp. Br. at 27).

But the prosecutor's mischaracterization of Jones' answers is highly relevant proof of purposeful discrimination. *See,* ***State v. Hopkins***, 140 S.W.3d 143, 154 (Mo. App. E.D. 2004) ("the prosecutor's statement during voir dire that [the venireperson's] relationship with [an African American defense attorney] 'is more than just a base relationship' is inaccurate considering [the venireperson's] actual voir dire testimony. The State mischaracterized [the venireperson's] relationship with [the defense attorney] as more than a 'base relationship'").

In Hampton's opening brief, he pointed out that the prosecutor did not ask the venire about whether they had ever been a witness. It was defense counsel who asked the questions (Tr. 175-77). In fact, the prosecutor failed to ask any follow-up questions on this topic, such as an important topic of whether or not the witness veniremembers had been witnesses for the State or for defendants.

Respondent asserts that "nothing in the law suggests that the State may base its strikes, whether peremptory or for cause, only on information elicited during its portion of voir dire." (Resp. Br. at 27).

It is true that during voir dire questioning by the other party that vemiremembers may make unexpected comments, which would influence a party's peremptory strikes or challenges for cause. But if the fact that a veniremember had previously been a witness in case was such an important factor to jury service such that it would affect this prosecutor's peremptory strikes, then why didn't the

prosecutor even ask the question? If Hampton had not asked the question, the prosecutor would not have known whether any of the veniremembers had been witnesses before. As noted by the court in ***Hopkins***, *supra*, "[b]ecause the prosecutor did not ask those questions, his behavior is inconsistent with his stated reasoning" for the peremptory strike. ***Hopkins***, 140 S.W.3d at 150-51. That the "witness" reason given by the prosecutor is disingenuous is further illustrated by the fact that a similarly situated juror (Cierpiot) was not struck by the state (S.L.F. 1; Tr. 175-76). This shows that the prosecution did not even keep track of which prospective jurors had been witnesses.

Respondent argues that the court's "past experience apparently convinced it that the prosecutor did not have a discriminatory motive in striking veniremember Jones." (Resp. Br. at 29).

We do not know the court's past experience with this particular prosecutor; in fact, we don't know whether the court had any past experience. The record is silent on that. But we *do* know the court's *present* experience with this prosecutor.

First, as noted above, the prosecutor's questioning during *voir dire* did not support his subsequent reasoning for wanting to strike Jones because the prosecutor did not ask the venire about whether they had ever been a witness.

Second, as noted above, the record also shows that the prosecutor misstated the record, asserting that Jones had indicated that "she didn't care for" being cross-examined as a witness; actually, Jones' responses were contrary to the prosecutor's assertion (Tr. 177).

Third, because the trial court denied the strike *under* Batson." (Tr. 229) (emphasis added), the record shows that the trial court found that the prosecutor's reason was pretextual. Apparently the trial court's experience with this prosecutor did not convince it that the prosecutor did not have a discriminatory motive in striking Jones.

Fourth, the trial court had already found the prosecutor's stated reason for striking juror Dotson (that he was disinterested in being a juror) was a pretext for discrimination (Tr. 227). The State's failed attempt to strike other minority jurors is relevant to the determination as to whether pretext was involved in the strike of other veniremembers. ***Hopkins***, supra. In ***Hopkins***, the court held that the failed attempt to strike another minority juror and an attempt to rely on a non-race-neutral reason for the strike of another minority veniremember, shed some light on the prosecutor's demeanor and credibility. ***Hopkins***, 140 S.W.3d at 157.

Respondent argues that "[N]o strategic adavantage would have been gained by removing African-American veniremembers" (Resp. Br. at 29).

The fact that Hampton is African-American is an objective factor worthy of consideration. Also, in addressing Hampton's third point of his opening brief, respondent argues that letters that Hampton wrote to a witness (Williams) in this case were relevant in this case because the letters "included statements in which Hampton accused Williams of selling Hampton out to 'white folks' and 'white crackers'", which revealed, "Hampton's strategy to appeal to Williams's sense of racial and

personal allegiance . . .” (Resp. Br. at 44). Thus, there existed a highly objective factor bearing on the State’s motive to discriminate on the basis of race in this case.

Finally, respondent attempts to discount the trial court’s disallowance of the state’s attempted strike of Dotson as being “more a function of the prosecutor failing to make a proper record to support the strike rather than a finding of discriminatory purpose.” (Resp. Br. at 29).

The record does not support this assertion. The trial court denied the State’s motion to strike Dotson, “under *Batson*,” based “upon the record” and the court’s “observations” (Tr. 227) (emphasis added). As noted above, a trial court cannot deny a peremptory strike “under Batson” (Tr. 229) unless the court has determined that there was purposeful discrimination. And, the fact that the trial court also relied upon its “observations,” in addition to the record, shows that the court’s denial of this strike was more than “a function of the prosecutor failing to make a proper record to support the strike” (Resp. Br. at 29).

CONCLUSION

The State was allowed to strike Jones even after the court had found that the state's reason for the strike was discriminatory. The racial discrimination was not rectified. By not re-seating Jones, the trial court violated the equal protection rights of Hampton and Jones.

For this reason, and for the other reasons set out in Hampton's opening brief, this Court must reverse Hampton's convictions and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,331 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on March 11, 2005. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of March, 2005, to Evan J. Buchheim, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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